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Supreme Court, U.S.
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No. 01-969

In the Supreme Court of the United States

CHRISTI ALFRED, individually,
Petitioner,

v.

CATERPILLAR, INC., a/k/a and/or d/b/a CAT,
a/k/a and/or d/b/a CAT, a foreign corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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STATEMENT OF COMPLIANCE WITH SUPREME COURT RULES

Pursuant to Rule 15(6) of the Rules of the Supreme Court of the United States, Petitioner herewith replies to Respondent's Brief in Opposition to address several new points made by Respondent and to clarify certain inaccuracies lest the opportunity to make such clarifications be forever waived.

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REFUTATION OF RESPONDENT'S QUESTION PRESENTED

Petitioner advises the Court that Respondent has redefined and/or conflated Petitioner's "Questions Presented" into just one "Question Presented" and in so doing, has missed the essential point of Petitioner's appeal. Petitioner does not challenge the ability of the Court to act as a gatekeeper pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999). Rather, Petitioner insists that the District Court failed to act as a gatekeeper **at the outset** of litigation pursuant to *Daubert* and *Kumho*.

Respondent does nothing but rehash the merits of the case and utterly fails to substantively explain why this Court should not grant certiorari. Respondent ignores the procedural improprieties in both the nation's courts in general and in the District Court's handling of this case in particular. With no valid objection being noted, Petitioner presents this Court an opportunity to remedy those improprieties, clarify the law, and establish a clear rule.

CLARIFICATION OF THE IMPORTANT ISSUES

A. Violations of the United States Constitution Occurred When Respondent Exploited a Circuit-Wide Split on the Propriety of Ambush Tactics.

The Federal Rules of Evidence (F.R.E.) and then-extant precedent notified Respondent, at the time this matter commenced, that it should object to Petitioner's expert in a timely manner. As more fully briefed in the Petition, the great weight of available authority and the overall goals of the

structure of the nation's legal system requires timely notice of Respondent's *Daubert* objection.

Respondent gambled that a last minute, stealthy, ambush-style objection might work to its favor and did not object until too late. It is undisputed that untimely *Daubert* objections are those made too late for the other party to react. Procedurally, fundamental fairness and the great weight of authority require, as more fully briefed in the Petition, that whatever prejudice results from delayed *Daubert* motions should be borne by the party failing to make a timely objection. The law and rules in effect at the time this matter commenced and was tried required that Respondent timely object if the expert's qualifications were questionable. Respondent sat stealthily and waited in ambush for the opportunity to challenge Petitioner's expert, which tactics received an approving nod from the District Court. Therein lies the violation of Petitioner's constitutional right to due process.

Notwithstanding Respondent's contrary assertions, the Federal Rules of Evidence in effect at the time Petitioner's complaint was filed and at the time of trial conclusively prove that Petitioner's position is not without merit or substance. The relevant portion of F.R.E. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles

> and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Petitioner's expert in mechanical engineering, Mr. William Munsell, was a fully qualified mechanical engineering expert under any reading of F.R.E. 702. There was never any challenge to this. Moreover, there was no need for a human factors expert to be introduced because the substance of Munsell's testimony allegedly falling within the realm of human factors as a sub-specialty of mechanical engineering was not such "scientific, technical or other specialized knowledge" as to require a separate expert.

Indeed, a concept such as pushing a lever forward or backward is not so scientific, technical or specialized or outside the realm of the average juror's experience that an expert was needed at all. The court could have taken judicial notice of its axiomatic universality and simplicity. This is reinforced by the Notes of Advisory Committee on Rules to 1975 amendment to F.R.E. 702, which provide:

> There is no more certain test for determining when experts may be used than the *common sense inquiry* whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. (Emphasis is added.)

It is undisputed that Respondent failed to move *in limine* to challenge Munsell's qualifications or raise the "expert in human factors" issue. It is likewise undisputed that the District Court failed to execute in a timely manner it's

duty and responsibility to act as gatekeeper contrary to precedent and F.R.E. 703. Respondent was required to *timely* move pursuant to F.R.E. 703 to challenge Munsell's testimony from ever being presented to the jury. F.R.E. 703 provides in relevant part:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Indisputably, the jury heard the evidence without the District Court first finding that the probative value of Munsell's testimony could not assist "the jury [in] evaluat[ing] the expert's opinion" and before any finding that the probative value of Munsell's opinion "substantially outweigh[ed] [its] prejudicial effect." Having never objected, Respondent never sought to have the District Court make the required F.R.E. 703 finding. Extant authority and precedent, specifically *Daubert* and *Kumho*, established that an untimely objection to the expert's testimony forever waived the objection.

Also undisputed is the explicit language of *Daubert* and *Kumho,* which require that gatekeeping occur "at the outset" (*Daubert* at 592) of litigation. Gatekeeping did not occur "at the outset" in this case. The District Court allowed Petitioner's case to be sandbagged by Respondent, violating Petitioner's right to notice of the objection as required by the great weight of authority and this nation's concept of fundamental fairness: Due process of law.

There is in fact a circuit-wide split regarding waiver of so-called *Daubert* objections if they are not timely made. Respondent claims that Petitioner's cited cases are appellate cases. That is true, however, only because appeals resulted when the District Courts failed to act as gatekeepers in a timely manner and a delayed *Daubert* motion was one of the errors appealed. Respondent's argument that the circuits are not split aids them not in the least because when reviewing such appeals on a *plain error* basis, the circuit courts do not directly address the problem created when District Courts fail to require that objections be made "at the outset" (*Daubert* at 592). The circuit courts review the appeals for plain error, but each addresses the ambush differently. Some find the objection waived, but most find it questionable, as more fully briefed in the Petition. Finally, Respondent's reliance on *Goebel v. Denver and Rio Grande Western Railroad Co.*, 215 F.3d 143, (10th Cir. 2000) is misplaced. *Goebel* is inapposite because, unlike in this case, the Railroad properly and timely moved *in limine* for a *Daubert* hearing.

B. The District Courts Not Only Had the Responsibility and Authority to Act as Gatekeeper, But It Had the Duty and Obligation to Do so "at the outset" pursuant to *Daubert* and *Kumho*.

Respondent's assertion that "the law makes no requirement on the trial judge to make such a [gatekeeping] determination prior to the completion of the testimony" (Brief in Opp. at page 11) is simply not correct. The text, structure, theory and history of the various authorities of this nation's legal system require timely notice of any legal action which impinges upon a constitutional right. Not only does F.R.E. 104(a) require gatekeeping before (hence the use of the word "*preliminary*") presentation of the evidence to a jury, so too does F.R.E. 703, which requires the District Court to review

the expert testimony before "disclos[ure] to the jury." Respondent's reliance on F.R.E. 104(e) is misplaced as F.R.E. 104 defines *whose* duty it is to weigh the evidence and the credibility of admitted testimony. Petitioner should receive a new trial.

Respondent never challenges, and so concedes, Petitioner's contention she was entitled to due process and that notice is a fundamental element of due process. Substantively, Respondent's and Petitioner's respective arguments only differ with regard to the nature of the notice to which Petitioner was entitled. **Petitioner contends that she was entitled to timely notice of Respondent's *Daubert* objection and Respondent asserts that Petitioner had notice that she may be ambushed.**

Respondent refers to the Advisory Committee Notes to the 2000 Amendments to F.R.E. 702, (Brief in Opposition at page 11), which in turn references *Bourjaily v. United States*, 483 U.S. 171 (1987). In *Bourjaily,* this Court specifically declined in Footnote 1 to "address the circumstances in which the burden of coming forward to show that the proffered evidence is inadmissible is appropriately placed upon the nonoffering party." (*Id.* at 731, n.1). Both the Advisory Committee and Respondent have ignored that very important footnote. Considering the common sense simplicity of Munsell's testimony that, from a mechanical engineering perspective, ***pushing a lever forward to move forward and pulling a lever backward to move backward is intuitive,*** basic and common to the nature and experience of being human, **this matter presents the Court that golden opportunity.**

At trial, Respondent challenged Munsell's qualifications as a "human factors" expert. It was on this

basis alone that the Respondent challenged and the District Court struck Munsell's testimony (after it had been admitted without prior objection). Any attempt to now claim that Respondent also attacked Munsell's "methodology" is misleading. Interestingly, even the District Court commented that it did not really know what a "human factors" expert was and sustained Respondent's delayed *Daubert* objection. (*See* Petition for Writ of Certiorari, Appendix G, at 41a). Clearly this court in *Bourjaily* recognized that there could exist circumstances in which the burden of showing that the proffered testimony is inadmissible shifts to the non-offering party. (*Id.* at n.1). This Court now has the opportunity to address when the burden should shift to the nonoffering party. Without question, such a burden should be imposed upon the nonoffering party when, as here, it seeks to remove from consideration common sense testimony and evidence that has already been admitted and presented to the jury *sans* objection.

Moreover, when the subject of an expert's testimony is so basic to human nature and common sense, as was Munsell's, the law does not require parsing that expert testimony to an even finer sub-specialty within mechanical engineering so as to explain to the jurors what they already know. In a circumstance such as this, the burden of proving that the offered evidence was inadmissible was properly upon the nonoffering party to explain why pushing a lever forward to move forward and pulling a lever backward to move backward is ***not*** intuitive in human beings. (*Id.* at 731, n.1) Respondent should have been required to explain how and why **only** a particularly super-specialized expert from a sub-specialty within mechanical engineering is qualified to testify to the obvious. Only review by this Court can establish one clear rule as to ***when Daubert*** challenges must be made or be forever waived.

C. Respondent's Arguments Regarding Whether the Jury Could Have Found the Paver Unreasonably Dangerous and that Petitioner's Evidence was Insufficient Refers to the Underlying Merits of the Case and Is Not a Substantive Objection to This Court Granting Certiorari to Address When *Daubert* Challenges Should be Made or be Forever Waived.

Mr. Munsell's expertise in mechanical engineering was clearly more than sufficient to allow a jury to learn that the subject paver was designed with a two-step directional/speed dial control mechanism instead of the one-step directional/speed dial control mechanism recommended by applicable industry standard.

The evidence clearly demonstrated that when using the subject paver, the operator must 1) select a switch to move forward or backward and 2) turn a dial left or right to go fast or slow. Mr. Munsell's expertise in mechanical engineering qualified him to testify that applicable industry standards recommend a one-step directional/speed control mechanism where the paver operator merely ***pushes a lever forward a little to move forward slowly and pushes the lever farther forward to move forward faster.*** That same lever design would allow a paver operator to ***pull a lever backward a little to move backward slowly and farther backward to move backward faster.*** Such a design can also maintain a desired constant speed. In any event, Respondent's arguments in this regard go to the merits of the case as opposed to whether this Court should grant Certiorari on the issue of ***when Daubert*** challenges are to be made in order to satisfy the requisites of due process and fundamental fairness, or be forever waived.

Considering that Petitioner and the paver operator were trained and qualified members of the paving industry, they were both "ordinary consumer" as defined in Oklahoma by *Kirkland v. General Motors Corporation*, 1974 OK 52, 521 P.2d 1353. The jury could reasonably conclude or infer from the evidence before it, *sans* a human factors expert, that the subject paver was sold "defective to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* at 1363.

CONCLUSION

Writ of Certiorari should be granted by this Court to establish a clear rule as to **when** a *Daubert* motion must be brought or be forever waived. The Court of Appeals opinion with respect to Respondent's Fed. R. Civ. P. 50 motion should be reversed and Petitioner should be granted a new trial.

Respectfully submitted,

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